(2)

NO. 92-1942

Supreme Court
FILED
JUL 2 1993
OFFICE OF THE CLERK

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1992

AMOCO PRODUCTION COMPANY,
Petitioner,

v.

VESTA INSURANCE COMPANY,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT D. GREEN
3400 One Allen Center
500 Dallas Street
Houston, Texas 77002
(713) 654-9222

Attorney of Record
for Respondent

Alpha Law Brief Company • Houston, Texas • (713) 981-9000 • 1-800-981-9001

BEST AVAILABLE COPY

16 pp

I.

QUESTIONS PRESENTED FOR REVIEW

Pursuant to Rule 24.2, *Supreme Court Rules*, Respondent Vesta Insurance Company adopts the Questions as stated by Petitioner Amoco Production Company.

II.

CERTIFICATE OF INTERESTED PARTIES AND PARTIES BELOW

Respondent Vesta adopts the Certificate of Interested Parties and Parties Below as stated by Petitioner Amoco.

The following information may also assist this Court. Vesta Insurance Company's name in Norwegian is Vesta Forsikring A/S. It is a wholly owned subsidiary of Forsakrings AB SkandiaNord.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

CERTIFICATE OF INTERESTED PARTIES AND PARTIES BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINION SOUGHT TO BE REVIEWED v

STATEMENT OF JURISDICTION v

STATEMENT OF THE CASE 1

ARGUMENTS 4

I. Amoco Offers No "Special And Important Reasons" For Granting Discretionary Review Of This Case, And No Such Reasons Exist 4

II. Amoco's Allegations Of Error Are Not Correct 6

1. The appellate court applied the proper standard of review 6

2. The appellate court did not ignore Amoco's arguments, nor grant relief on an un-pled theory 8

SUMMARY AND CONCLUSION 10

TABLE OF AUTHORITIES

CASES **Page**

East v. Romine, Inc., 518 F.2d 332, 338 (5th Cir. 1975) 7

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393, 43 S.Ct. 422, 423, 67 L.Ed. 712 (1923) 5

Republic Nat'l Life Ins. Co. v. Spillars, 368 S.W.2d 92 (Tex. 1963) 7

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74, 75 S.Ct. 614, 616, 99 L.Ed. 897 (1955) 5

Securities & Exchange Com'n. v. National Securities, 393 U.S. 453, 460, 89 S.Ct. 564, 568, 21 L.Ed.2d 668 (1969) 4

STATUTES

15 U.S.C. § 1012 4

28 U.S.C. § 1332 5

RULES

Rule 10, *Supreme Court Rules* 4, 5, 6, 10

Rule 24.2, *Supreme Court Rules* i

OPINION SOUGHT TO BE REVIEWED

Respondent Vesta adopts the statement of Petitioner Amoco concerning the opinion sought to be reviewed. Vesta also adopts the verbatim reproductions of the trial court opinion, the appellate court opinion and the appellate court's denial of rehearing, which are reproduced in the Appendix to the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

Respondent Vesta adopts the statement of jurisdiction contained in the Petition for Writ of Certiorari.

NO. 92-1942

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1992

AMOCO PRODUCTION COMPANY,
Petitioner,

v.

VESTA INSURANCE COMPANY,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Amoco's Statement of the Case is correct with respect to the underlying facts.

Gonzales, an employee of Cantu, was injured while Cantu was performing work for Amoco under contract. The provisions of the Texas Worker's Compensation Act prevented Gonzales from suing Cantu, so Gonzales sued Amoco, asserting that Amoco's negligence caused his

injuries. Gonzales' claim was ultimately settled for $6,215,000.

Amoco sought indemnity from Cantu pursuant to provisions of the Cantu-Amoco contract. Cantu's underwriters paid their policy limits of $3,500,000.

Amoco was insured by Vesta under a policy that had a self-insured retention of $5,000,000 "ultimate net loss," meaning that Vesta was required to respond only when Amoco's "ultimate net loss" exceeded $5,000,000. The Vesta Policy defined "ultimate net loss" as "the total sum which the Assured, or any company as his insurer becomes obligated to pay by reason of personal injury or property damage . . . ." (Petition, A-3).

Amoco claimed that the first $5,000,000 spent to settle the Gonzales claim all constituted "ultimate net loss" within the meaning of the Vesta Policy, including the money from Cantu. Amoco therefore argued that Vesta was responsible for the final $1,215,000 required to settle Gonzales' claim. Vesta disagreed for two reasons. First, Vesta argued that Cantu's indemnity payment was not part of Amoco's "ultimate net loss," meaning that Amoco's "ultimate net loss" in the Gonzales case was only $2,715,000, which would not trigger Vesta's obligations. Alternatively, Vesta argued that it was subrogated to Amoco's indemnity claim against Cantu, and that if Vesta did pay any amount over $5,000,000, it was entitled to be reimbursed from the Cantu payment.

To resolve that impasse and effect settlement, Vesta temporarily acquiesced to Amoco's position. Because the insurance policy made Vesta liable in proportion to Amoco's ownership of the facility where any accident occurred, and because Amoco had a 65.7% ownership interest in the

facility where Gonzales was hurt, Vesta paid $798,255, or 65.7% of $1,215,000. By letter agreement, the parties denominated the Vesta payment as a "loan/advance," and agreed that Vesta could bring a declaratory judgment action to seek a refund.

Vesta's declaratory judgment action was tried to the bench on stipulated facts, and the court found for Amoco on two grounds.[1] First, it said that Vesta, as an insurer, could not exercise its subrogation rights against Amoco, its insured. (Conc. of Law No. 1, Petition, A-5 to A-6). Second, the trial court noted that Amoco could insure its $5,000,000 retention, and declared that the Cantu indemnity agreement was essentially a form of insurance (Conc. of Law No. 2, Petition, A-6 to A-7). That being so, the trial court said that the $5,000,000 paid to Gonzales was all part of Amoco's "ultimate net loss."

Vesta appealed, and the Fifth Circuit Court of Appeals reversed and rendered.[2] The appellate court said that Vesta was not seeking to exercise any subrogation rights against Amoco, but rather, was invoking subrogation principles in order to exercise Amoco's rights against Cantu. The appellate court said that Vesta's direct claim against Amoco was for a refund pursuant to the "loan/advance" agreement between the parties. (Petition, A-18). While the appellate court agreed that Amoco could insure any or all of its $5,000,000 self-insured retention, it held that the indemnity agreement with Cantu was not "insurance" under Texas law or within the meaning of the Vesta Policy.

---

[1] The trial court's Final Judgment and Order is reproduced as A-1 to A-10 of the Petition for Writ of Certiorari.

[2] The appellate court opinion is reproduced as A-11 to A-23 of the Appendix to the Petition for Writ of Certiorari.

(Petition, A-14 to A-17). Having so declared, the appellate court reversed and rendered. It ordered that Amoco refund the "loan/advance" to Vesta, with interest. It also overturned the trial court's award to Amoco of the attorneys' fees spent in defending the Gonzales case. (Petition, A-22 to A-23).

Amoco filed a petition for rehearing, which the Fifth Circuit denied. (Petition, A-24). Amoco now seeks discretionary review from this Court.

ARGUMENTS

I. Amoco Offers No "Special And Important Reasons" For Granting Discretionary Review Of This Case, And No Such Reasons Exist.

Rule 10 of the *Supreme Court Rules* states that "[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Amoco has made no effort to show that any such reasons exist in this case. Indeed, Amoco's petition conclusively shows that no such reasons exist, as the following demonstrates:

1. The underlying dispute involves the interpretation of the rights and liabilities of an insurance company and one of its policyholders, a matter that Congress has, by statute, committed to state regulation. 15 U.S.C. § 1012, *Securities & Exchange Com'n. v. National Securities*, 393 U.S. 453, 460, 89 S.Ct. 564, 568, 21 L.Ed.2d 668 (1969). Thus, the substantive dispute between Amoco and Vesta is purely a matter of state law, and does not even arguably implicate a federal interest.

2. In the same vein, it is worth noting that this case was brought in federal court because the parties are

diverse under 28 U.S.C. § 1332 (Petition, A-1). This Court is being asked to sit as a super-supreme court for the State of Texas. Where there are no federal or constitutional questions at issue, there is no reason for this Court to take on that role.

3. Perhaps mindful of the lack of any federal interest in the underlying substantive insurance issues, Amoco does not directly argue that the appellate court reached the wrong result, but rather, argues that the appellate court committed procedural errors, namely, applying an improper standard of review and failing to consider certain arguments. In so arguing, Amoco is asking this Court to act as an error-correcter rather than as a law-declarer, a request which simply cannot be "special and important" within the meaning of Rule 10.

4. Amoco does not and cannot contend that the appellate decision sets any sort of broad precedent, but argues only that the decision adversely affects its own interests. In seeking discretionary review of such a decision, Amoco overlooks the fact that this Court, unlike a federal circuit court of appeals, "does not sit for the benefit of the particular litigants," and that the "special and important reasons" requirement implies "a reach to a problem beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614, 616, 99 L.Ed. 897 (1955). As an earlier case had said:

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties . . .

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393, 43 S.Ct. 422, 423, 67 L.Ed. 712 (1923).

Specific procedural errors with no federal implications and no precedential importance are simply not "special and important" cases within the meaning of Rule 10 of this Court's rules. Even if Amoco's allegations of error were correct, review by this Court would not be warranted.

II. Amoco's Allegations Of Error Are Not Correct.

1. The appellate court applied the proper standard of review.

Amoco first takes issue with the appellate court's statement that *de novo* review was appropriate. According to Amoco, the trial court made critical findings of fact that were entitled to deferential review under a "clearly erroneous" standard.

The finding that Amoco contends received insufficient deference is Finding of Fact No. 8, in which the trial court said:

> The Gonzales litigation settled prior to trial for $6,215,000. *Amoco was obligated to pay the entire amount, therefore, Amoco incurred 'ultimate net loss' in excess of the underlying limits of the Vesta Policy.*

(Petition, A-4)(emphasis added). Amoco contends that the emphasized portion was a finding of fact[3] that should have been reviewed under the clearly erroneous standard, and should not have received *de novo* review.

Amoco's characterization of the emphasized sentence is incorrect. The underlying events--that is, who paid how much to whom and when--were all matters of fact, and were all resolved through stipulation. The trial court's statements that Amoco may have been "obligated" to pay a certain amount, and that in so doing, Amoco incurred an "ultimate net loss" as defined by the Vesta Policy, are pure conclusions of law, because those statements involve the legal effects of the undisputed facts. Texas law, which applies in this diversity case, treats the question of whether an undisputed set of facts gives rise to insurance coverage as a pure question of law for the court to resolve. *Republic Nat'l Life Ins. Co. v. Spillars*, 368 S.W.2d 92 (Tex. 1963). The appellate court therefore applied the proper standard of review.

Amoco also argues that the trial court made a fact-finding when it held that Cantu, in honoring the indemnity demand, was "acting" as Amoco's insurer. (Petition, 10). Again, though, the question was not really how Cantu "acted" in the abstract, which was undisputed. The question was whether its payment under its indemnity contract with Amoco made it an "insurer" as that term was used in the Vesta Policy. Again, then, this question involved application

---

[3] Amoco does not appear to be arguing that the statement is a finding of fact simply because it was denominated as such. The trial court's categorization is not controlling, *East v. Romine, Inc.*, 518 F.2d 332, 338 (5th Cir. 1975), as the trial court itself recognized when it said, "Any finding of fact which may be deemed a conclusion of law is deemed as such." (Finding of Fact No. 11, Petition, A-5).

of insurance policy language to a set of undisputed facts, namely, the Amoco-Cantu indemnity contract and Cantu's payment pursuant to that contract. So again, the appellate court correctly treated this as an issue of law.

2. The appellate court did not ignore Amoco's arguments, nor grant relief on an un-pled theory.

Amoco next argues that the appellate court "never addressed the merits of Amoco's argument that Vesta had no subrogation right to exercise against Cantu at the time Vesta made its payment to Amoco." (Petition, 11). This is a puzzling assertion for two reasons. First, the appellate court did specifically address that issue, and it explained why Amoco's argument was incorrect. (Petition, A-18 to A-19). Second, it is hard to see how not addressing an argument can ever be error *per se*. An unaddressed contention is simply a contention rejected *sub silentio*. The error, if any, would have to lie in the rejection of the argument rather than in the failure to address the argument. Yet again, perhaps because the underlying substantive issue is a purely state-law matter, Amoco does not even argue that the appellate court committed substantive error in affirming Vesta's subrogation rights. It does not appear that Amoco has presented a reviewable issue.

The gist of Amoco's complaint appears to be the assertion that the appellate court relied on an un-pled theory when it stated that if Amoco destroyed Vesta's subrogation rights, then Vesta's insuring obligation was also terminated. (Petition, 12). This theory was nothing more than rebuttal. Amoco raised the argument (which it repeats in the Petition) that Cantu honored its indemnity obligation before Vesta made any payments, so that at the time Vesta paid, Amoco no longer had any rights against Cantu to which Vesta could

be subrogated. Faced with that "timing is of the essence" argument, Vesta responded by citing Texas authority holding that if an insured settles before his insurer makes a payment, and if in so doing he extinguishes his insurer's subrogation rights, the insurer's obligations to the insured are extinguished. Vesta never used this "extinction of obligation" theory offensively, but used it only to demonstrate that the "timing is of the essence" theory did not benefit Amoco, which is exactly the use to which the appellate court put Vesta's theory. (Petition, A-18).

Lastly, Amoco complains that the appellate court adopted a theory never advanced below, namely, that Vesta could have pursued Cantu directly without reference to any subrogation rights. (Petition, 11). As the appellate opinion shows (Petition, A-19), that statement was cumulative. If it was error, it cannot be harmful error.

SUMMARY AND CONCLUSION

Amoco asks this Court to review an appellate court decision involving Texas insurance law, which does not in any way implicate any federal interest. Amoco argues that the appellate court applied the wrong standard of review, and that it ignored certain arguments. Vesta disagrees with Amoco's characterizations. However, even if Amoco were correct, the writ of certiorari should not be granted. Amoco does not argue that the alleged errors have any precedential importance, but simply argues that because the court used improper procedures, it may have reached an erroneous result. This case, then, affects only the rights of the particular litigants, and has no federal or constitutional implications whatsoever. It is simply not a case appropriate for review by this Court under Rule 10 of the *Supreme Court Rules*. The petition should be denied.

Respectfully submitted,

ROBERT D. GREEN
3400 One Allen Center
500 Dallas Street
Houston, Texas 77002
(713) 654-9222

Attorney of Record
for Respondent